2. The Commission's forbearance analysis must be consistent with the impairment analysis

The D.C. Circuit's decision in *AT&T Corp. v FCC*[179] requires that the Commission review forbearance requests in a manner that is consistent with the Commission's prior policies and standards applied in similar cases or explain why it is reasonable to depart from them.[180] Thus, when considering petitions for forbearance from the Act's unbundling requirements, the Commission's analysis must be consistent with its impairment framework, in particular the framework established in the *TRRO* and affirmed by the D.C. Circuit in *Covad*.[181] The *Omaha Order* failed to do this, but the Commission should not repeat that failure with respect to Qwest's Petitions. The statutory impairment standard cannot be ignored simply because Qwest seeks relief under section 10 rather than section 251(d)(1). The relief Qwest requests is the legal and practical equivalent of a finding of non-impairment in particular MSAs identified in Qwest's Petitions. The FCC cannot use the statutory criteria of section 10 "as a form of legal jujitsu to justify its relaxation"[182] of section 251(c)(3) unbundling obligations. Granting Qwest's petition,

---

different than its standard for evaluating impairment under section 251 and why abandoning the touchstone of impairment is warranted.

[179] 236 F.3d 729, 736 (D.C. Cir. 2001) ("*AT&T*").

[180] *Id.* (finding that the Commission's analysis in evaluating forbearance from dominant carrier regulation cannot depart from Commission's traditional non-dominance analysis without justifying such departure.) .

[181] *See Covad Comm'ns Co. v FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[182] *Ass'n of Comm'ns Enters. v FCC*, 235 F.3d 662, 667 (D.C. Cir. 2002).

whether in whole or in part, absent an impairment analysis consistent with the *TRRO* would represent an unexplained departure from the FCC's recently affirmed impairment standard.[183]

B. Section 251(c) Has Not Been "Fully Implemented" and the Omaha Order's Interpretation of the Term "Fully Implemented" was Unreasonable

Section 10(d) provides that "the Commission may not forbear from applying the requirements of section 251(c) or 271 … until it determines that those requirements have been fully implemented."[184] Although the *Omaha Order* found that this requirement was satisfied, it relied on a patently unreasonable interpretation of the statute that the Commission should now correct and not repeat when considering Qwest's Petitions. The D.C. Circuit's opinion in *Qwest v FCC*, 482 F.3d 471 (D.C. Cir. 2007) does not foreclose this issue; the Court did not fully resolve the Petitioner's attack on the Commission's construction of Section 10(c) but found that the arguments were not sufficiently raised below and were thus barred under Section 405 of the Act.[185]

1. The *Omaha Order* is Unreasonable and Inconsistent with Previous Commission Decisions

The *Omaha Order* improperly concluded that "fully implemented" means no more than an initial rulemaking by the Commission. It further found that the Commission is the entity that "implements" Section 251(c), and "hence the full implementation of section 251(c) is triggered

[183] *See Covad,* 450 F.3d 528.

[184] 47 U.S.C. §160(d).

[185] *Qwest v FCC*, 482F.3d at 472.

by action taken by this Commission."[186] This interpretation of "fully implemented" was flawed for several reasons.

First, the Commission previously viewed the adoption of its rules as the beginning, not the end, of implementation of Section 251(c). In the *Local Competition Order,* the Commission described its initial adoption of Section 251(c) rules as merely "*the initial* measures that will enable the states and the Commission *to begin* to implement sections 251 and 252."[187] The *Omaha Order* failed to address, or even distinguish, the Commission's prior view that implementation of Section 251(c) involves substantial activity by it, the states, and ILECs well beyond any rules it promulgates to implement this section of the Act. For example, the Commission found that Section 251 involves an "allocation of responsibilities" between itself and the states.[188] Both the Commission and the states administer the Commission's rules and the states perform other critically important functions pursuant to Section 251.[189]

The *Omaha Order* ignores these previous findings that Commission rules are the initial measures needed to implement § 251 and fails to explain its reason for abandoning its precedent.[190] The *Omaha Order* asserts that Congress intended Section 251(c) to be "fully imple-

[186] *Omaha Order*, ¶ 53.

[187] *Local Competition Order,* ¶¶ 6, 307(emphasis supplied).

[188] *Local Competition Order*, ¶ 41.

[189] *Id.*, ¶ 53.

[190] *See AT&T,* 236 F.3d at 734.

mented" under Section 10 upon the mere establishment of rules by the Commission.[191] The Commission silently departed from previous policies and ignored precedent in rendering this decision,[192] but it should not compound this mistake by granting Qwest's Petitions based on this decision.

Second, the *Omaha Order* also improperly disregarded the statements of the D.C. Circuit in 2001 that Section 251(c) had not been fully implemented.[193] The Commission assumed the court meant merely that the Commission had not at that time interpreted "fully implemented."[194] But, like the *Omaha Order*, this ignores the Commission's previous (and correct) view that the initial establishment of rules was the beginning, not the end, of implementation of Section 251(c). The fact that many petitions for reconsideration and clarification of the FCC's 251(c)(3) rules remain unresolved[195] and many state proceedings implementing the *TRRO* remain ongoing or have yet to be initiated reinforce this point.[196]

---

[191] The finding of *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") that the FCC in its *TRO* had unlawfully delegated authority to the states to establish, pursuant to Section 251(d)(2), unbundling standards does not invalidate the FCC's view in the *Local Competition Order* that, under the Act, states play a key role, such as through setting prices and conducting arbitrations, in implementing Section 251(c).

[192] *AT&T*, 236 F.3d at 736.

[193] *Ass'n of Comm'ns Enters. v. FCC*, 235 F.3d 662, 666 (D.C. Cir. 2001).

[194] *Omaha Order*, ¶ 53 n.133.

[195] *See, e.g.*, Petition for Reconsideration of CTC Communications Corp., *et al.*, WC Docket No. 04-313, CC Docket No.01-338 (filed Mar. 29, 2005); Petition for Reconsideration of CBEYOND Communications, WC Docket No. 04-313, CC Docket No. 01-338 (filed Mar. 28, 2005); Petition for Reconsideration of Birch Telecom, Inc., *et al.*, WC Docket No. 04-313, CC Docket No. 01-338 (filed on Mar. 28, 2005); Petition for Reconsideration and/or Clarification of the

Third, the *Omaha Order's* interpretation of "fully implemented" amounts to an "error in judgment."[197] The Commission's rules ordinarily become effective thirty days after publication in the Federal Register, or even sooner based on special showings.[198] Under the Commission's interpretation of "fully implemented," one must presume that Congress intended for Section 251(c) to be deemed to be fully implemented shortly after the Commission, pursuant to Section 251(d)(1), adopted its original rules on August 6, 1996. But it is highly improbable that Congress

---

PACE Coalition, WC Docket No, 04-313, CC Docket No. 01-338 (filed on Mar. 28, 2005); Petition for Reconsideration and/or Clarification of Order on Reconsideration of Covad Communications Group, Inc. *et al.*, CC Docket Nos. 01-338, 98-147, 96-98 (filed Jan. 28, 2005).

[196] For instance, the State commission proceedings implementing the *TRRO* and *TRO* remain ongoing in Delaware, Maryland, and Pennsylvania. *See In the Matter of the Petition of DIECA Communications Inc., d/b/a Covad Communications Company, D-Tel LLC, SNiP LiNK LLC, Xo Communications Services, Inc., f/k/a XO Delaware, Inc., and XTel Communications, Inc., for an Amendment to Interconnection Agreements with Verizon Delaware Inc., Pursuant to Section 252(B) of the Communications Act of 1934, as Amended, the Triennial Review Order and the Triennial Review Remand Order; In the Matter of the Application of Verizon Delaware Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Delaware Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order,* PSC Doc. Nos. 05-164; 04-68; *In the Matter of the Petition of Verizon Maryland Inc. for Consolidated Arbitration of an Amendment to Interconnection Agreements of Various Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Maryland Pursuant to Section 252 of the Telecommunications of 1996*, Case No. 9023; *Petition of Verizon Pennsylvania Inc. and Verizon North Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers in Pennsylvania Pursuant To Section 252 of the Communications Act of 1934, As Amended, and the Triennial Review Order,* P-00042092. Moreover, Section 252 arbitrations implementing the FCC's *TRO* and *TRRO* rules have yet to be initiated in many states across the Nation.

[197] *AT&T Corp. v. FCC*, 394 F.3d 933, 936 (D.C. Cir. 2005) (citing *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001)).

[198] 5 U.S.C. § 553(d).

intended to allow the Commission to forbear from application of Section 251(c)(3)'s requirements virtually at the moment the FCC's rules for implementing the requirements became effective — and prior to them being overturned three times and before sustainable competition due to that unbundling has truly emerged. The Commission should conclude that it made an error in judgment in the *Omaha Order* that should be corrected here.[199]

Fourth, the Commission's current interpretation of Section 10(d) with respect to Section 251(c) - that states that section is "fully implemented" when the Commission adopts rules implementing Section 251(c) cannot be squared with the *OI&M Forbearance Order*, where the Commission held that section 10(d) applies not only to the statutory requirements of section 251(c), but also to the Commission's regulations implementing those requirements.[200] In that Order, the Commission denied Verizon's petition for forbearance from the Commission's rules regarding Bell Company sharing of operating, installation and maintenance functions. These rules were adopted by the Commission and are not found in the statute. *See* 47 C.F.R. § 53.203(a)(2). The Commission found that it could not forbear from applying these rules because Section 10(d) prohibited forbearance from the rules until the Section 271 was fully implemented. *OI&M Forbearance Order* at ¶ 5. Under that logic, forbearance from the Commission's rules promulgated under § 251(c) is not permitted until § 251(c) is "fully implemented."

---

[199] *See AT&T Corp. v. FCC*, 394 F.3d 933, 936 (D.C. Cir. 2005) (citing *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 258 (D.C. Cir. 2001)).

[200] *OI&M Forbearance Order*, ¶¶ 7-8.

Fifth, the Commission's interpretation of section 10(d) is unreasonable (and therefore impermissible) because it undermines the Act's purposes. The requirements of section 251(c) - one of the core provisions intended to *open* local markets to effective competition is designed to ensure that local markets *remain* open to competition. Specifically, the interconnection, unbundling and resale obligations of section 251(c) are designed to establish a baseline requirement that core network facilities continue to be made available on nondiscriminatory terms until Qwest's substantial market power is sufficiently dissipated. It would therefore make no sense to grant the Commission authority to forbear from enforcing discrete requirements of section 251(c) (such as loop unbundling requirements) merely upon a finding that the Commission has established rules requiring the ILECs to provide unbundling, resale and interconnection. Section 10(d) was clearly designed to place the entire framework of local competition protections off-limits from the exercise of forbearance authority until all of the requirements of those interrelated provisions are fully implemented.

2. Section 10(d) Bars Forbearance from Section 251(c) Until the ILEC Provides Proof of a Robust, *Wholesale* Market

The interpretation of "fully implemented" adopted in the *Omaha Order* is erroneous because it is inconsistent with the core objectives of the Act. The Commission has established that a critical question in determining whether section 251 or 271 has been fully implemented is

whether the "goals" of the underlying statutory provisions are fulfilled.[201] It is clear that the goals underlying Section 251's unbundling requirements have yet to be fulfilled.

In drafting Section 10, Congress anticipated that the "forbearance authority will be a useful tool in ending unnecessary regulation."[202] But Section 10 was designed to give the Commission a tool to clear the underbrush of sixty years of regulation that had accumulated since enactment of the original Communications Act — some of which was no longer necessary yet remained on the books. Section 10 was not intended as a destructive black hole that would suck in and annihilate Congress' newly enacted scheme to promote and enhance local competition.

It is unfathomable that Congress would have with one hand "reorganize[d] local telecommunications markets," with the "objective of uprooting the monopolies" over local telecommunications services but with the other hand permit the FCC to repeal those very provisions of the Act before the stated goal was achieved.[203] Congress explicitly limited the FCC's ability to grant forbearance from the Act's market opening provisions until those provisions were "fully implemented."[204]

---

[201] *Petition of Verizon for Forbearance from the Prohibition of Sharing, Operating, Installation, and Maintenance Functions Under Section 53.203(a0(2) of the Commission's Rules*, Memorandum and Order, 18 FCC Rcd 23525, ¶7 (2003) ("*Verizon Forbearance Order*").

[202] *See* Committee on Commerce Report, HR 1555, Section 103 (104th Congress, July 24, 1995).

[203] *See Verizon*, 535 U.S. at 488.

[204] 47 U.S.C. §160(d).

Sustainable competition cannot be realized, and thus Sections 251 is not "fully implemented," unless there exists viable cost-based, wholesale alternatives to the ILECs' bottleneck facilities such that incumbent carriers are no longer deemed "dominant" in local services markets.[205] The *Omaha Order*'s premature finding that Section 251 is "fully implemented contravenes the purpose of the Act, and flouts the Section 10(d)'s express requirement that the Commission, *as a threshold matter*, find Section 251 "fully implemented" before considering a forbearance petition.[206]

Section 251(c) focuses on making local telecommunications markets competitive by first opening them to competitors and then ensuring that those markets remain open to entry through interconnection, provision of UNEs or resale, or some combination thereof. As the Commission has explained, the long-term goal of the 1996 Act is to "creat[e] robust competition in telecommunications," particularly "competition among multiple providers of local service that would drive down prices to competitive level."[207]

Considering the paramount importance that Congress assigned to fostering the development of competitive local markets, the most reasonable reading of section 10(d) requires the Commission to find that a robust wholesale market for facilities and services exists in a relevant

---

[205] *Cf. Verizon,* 535 U.S. at 538 (upholding Commission rules that interpret the "statutory dut[ies]" of section 251(c) to "reach the result the statute requires" and thereby "get[] a practical result").

[206] *Verizon Forbearance Order,* 18 FCC Rcd 23525, ¶¶ 5, 9.

[207] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,15 FCC Rcd 3696,¶ 55 (1999).

geographic area so that the Commission is assured that forbearing from enforcing the requirements of section 251(c) will not lead to the remonopolization of local and long distance services. Qwest must provide a record that focuses on a specific geographic market or markets. As the Commission recognized in the *TRO* and *TRRO*, alternative sources of supply of the network elements needed to provide competitive local service will become available in different markets at different times.[208]

Congress enacted section 10 to provide the Commission flexibility to forbear from statutory provisions and regulations where markets have become fully competitive and regulatory requirements are no longer necessary.[209] But Congress recognized that such a level of competition was not possible until the ILEC dominance over bottleneck facilities was broken. As Senator McCain explained section 10 would be met "when markets are deemed competitive."[210] It is absurd to claim that Congress intended to permit ILECs to seek release from their market-opening obligations under section 251(c) immediately after such obligations took effect for the very first time.

---

[208] *See e.g. TRRO*, ¶¶ 43-45; *TRO*, ¶ 118, 130.

[209] See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, 14 FCC Rcd 6004,7 6 (1999) ("For more than a decade prior to the 1996 Act, the Commission attempted to forbear from tariff regulation of nondominant IXCs, but was struck down by the courts. Subsequently, the Commission requested, and Congress granted in section 10 of the Act, forbearance authority, with the express understanding that it would be used to effectuate interexchange detariffing.").

[210] 141 Cong. Rec. S. 7942, 7957 (June 8, 1995) (statement of Senator McCain) quoting from Heritage Foundation letter).

Consequently, the Commission should find that section 251(c) is fully implemented only when, in addition to retail competition, there is a robust wholesale market, not as in Omaha, that Qwest is the only wholesale provider.

C. It Would Be Inconsistent with the TRRO for the Commission to Find that the Availability of Special Access, § 271, and Resale Offerings Justify Forbearance from Qwest's § 251(c)(3) Obligations.

1. Special Access and § 271 facilities are no substitutes to cost-based UNEs

The *Omaha Order* utterly ignored the *TRRO* by relying on the availability of Qwest special access services to justify the elimination of access to unbundled loops and transport. Having ruled in the *TRRO* that it would be a "hideous irony" to rely on special access—"the pricing of which falls largely within [ILEC] control"[211]—the *Omaha Order* irrationally relied *primarily* on the availability of special access in determining that continued application of Section 251(c)(3) was no longer necessary to ensure just, reasonable and nondiscriminatory rates or to protect consumers in the Omaha MSA.

The Commission should not take a similar approach when addressing Qwest's Petitions. Without the essential cost-based UNE pricing safeguard, there is nothing to prevent Qwest from raising prices on wholesale services to something "close to or equal to" the retail rate, creating a price squeeze. The Commission itself envisioned this scenario chilling competition. Thus, rather than sustaining a local competitive market, the elimination of Qwest's obligation to provide

[211] *TRRO*, ¶ 59.

UNEs will ultimately destroy it by trusting Qwest to maintain competitive wholesale pricing even though the company has little incentive to do so.

The Commission's reliance on the availability of Section 271 checklist items suffers from the same shortcomings as its reliance on the availability of special access. The BOCs contend that Section 271 checklist items are — for all relevant purposes — indistinguishable from special access. As is the case with special access, Section 271 checklist items are not subject to cost-based pricing. Instead, prices for Section 271 checklist items need only comply with the just and reasonable pricing standards of Section 201 and 202,[212] thus creating precisely the same risk of price squeezes that the Commission found to be an issue with special access pricing.

2. Resale is not a substitute for cost-based UNEs

The continued availability of resale services offered by Qwest pursuant to Section 251(c)(4) does not support relieving Qwest of provisioning cost-based loop and transport UNEs. As the FCC explained in the *Local Competition Order*, "carriers reselling [ILEC] services are limited to offering the same service an [ILEC] offers at retail", whereas carriers relying on UNEs can use those piece-parts as inputs to provide any service they choose to offer.[213] As a result, "carriers using [UNEs] ... have greater opportunities to offer services that are different from those offered by [ILECs]" than is the case with carriers relying on resale.[214] The primary means

[212] *TRO*, ¶ 656.

[213] *Local Competition Order*, ¶ 332.

[214] *Id.*

by which a reseller competes with an ILEC is through price, and in that regard, its ability to do so "is limited ... by the margin between the retail and wholesale price of the product."[215] In contrast, UNE-based competitors compete on price as well as through innovation. Accordingly, The Commission has already "reject[ed] the notion [that] the rebundling of UNEs is equivalent to resale."[216]

3. Unbundling forbearance is especially inappropriate given the significant open FCC proceedings related to special access, § 271 and § 251(c)(4) resale offerings

Apart from the fact that forbearance from Qwest's loop and transport unbundling was not appropriate because special access, § 271(c) offerings, and § 251(c)(4) resale are not sufficient competitive alternatives, such forbearance remains inappropriate given the significant open proceedings related to each of these critical obligations, and the numerous unresolved problems associated with their implementation. Because of this, Section 251(3) unbundling is critically needed to ensure that Qwest's telecommunications offerings are available at just, reasonable and nondiscriminatory rates, terms and conditions.

First and foremost, the special access framework is fraught with of problems and does not produce just and reasonable rates, terms and conditions reflective of a competitive market. In January of 2005, the Commission issued the *Special Access NPRM* to examine the rates, terms and conditions of price cap local exchange carriers' (LECs) interstate special access services and

---

[215] *Id.*

[216] *See Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 340 (1997).

the regulatory framework that should apply to them.[217] The Commission initiated this proceeding as a result of AT&T Corp.'s 2002 Petition for Rulemaking and its 2003 Petition for Mandamus to the D.C. Circuit requesting the court to direct the FCC to act and grant interim relief.[218]

In June and July of 2005, CLECs, IXCs and the Ad Hoc Users Group submitted comments in the *Special Access NPRM* urging interim and long term relief that, in many respects, echoed observations AT&T Corp. made in its 2002 Petition for Rulemaking. They generally claimed that the pricing flexibility triggers[219] and the CALLS[220] plan have failed to produce

[217] *See Special Access NPRM,* ¶ 19.

[218] *Id.*, ¶ 21.

[219] In 1999, the Commission adopted the *Pricing Flexibility Order* to ensure that the Commission's interstate access charge regulations did not interfere with the development of competition within interstate access markets. *Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶¶2, 19, 24, 68-175 (1999) ("*Pricing Flexibility Order*"). In it, the Commission developed competitive triggers designed to measure the extent to which competitors had made irreversible, sunk investment in collocation and transport facilities. Pricing flexibility is obtained by price cap LECs in two separate phases, each on a Metropolitan Statistical Area (MSA) basis. There are separate triggers for two categories of special access services: (1) channel terminations (*i.e.*, loops) connecting a LEC central office to a customer's premises; and (2) all other special access (primarily interoffice transport). Under Phase I Relief, a price cap carrier may offer volume and term discounts and customer-specific contract tariffs for interstate special access services, on one day's notice; however, services that are not offered under a discount or a contract remain subject to the general price cap rules. Under Phase II Relief, a price cap carrier may additionally set its generally-available special access rates at any level without regard to the price cap rules, on one day's notice.

[220] In 2000, the Commission adopted what is known as the CALLS plan. It was proposed by an industry coalition as a means to phase-out implicit subsidies and to move towards a more market-based approach to rate setting over a 5 year period. *See Access Charge Reform*, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000) ("*CALLS Order*"). The FCC offered price cap carriers a choice between completing the forward-looking cost studies that were required by the previous *Access Charge Reform Order*, or voluntarily making the rate

competitive prices, special access rates need to be reset to reflect actual costs, Phase II pricing flexibility should be abolished or tightened, and that some BOC term and volume special access contracts reflect pricing and other terms and conditions that could not be imposed in a fully competitive market.[221] They presented evidence that special access reforms are necessary because special access rates are not at levels that would exist in a competitive market.[222] They showed that special access rates are dramatically higher than the cost-based rates for comparable UNE services or rates offered by competitors.[223] In addition, ARMIS data revealed that the BOCs are enjoying increasing and excessive monopoly profits and returns on special access services.

---

reductions required under the five-year CALLS plan. All price cap carriers opted for the CALLS plan. The goal of the plan was to transition the "marketplace closer to economically rational competition, and [to] enable [the Commission], once such competition develops, to adjust [the] rules in light of relevant marketplace developments." *Id.*, ¶ 36.

[221] *See, e.g.*, Comments of ATX *et al.*, WC Docket 05-25 (filed June 13, 2005); Comments of the Ad Hoc Telecommunications Users Committee, WC Docket 05-25 (filed June 13, 2005); Comments of NEXTEL, WC Docket 05-25 (filed June 13, 2005); Comments of COMPTEL/Ascent, WC Docket 05-25 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket 05-25 (filed July 29, 2005); Reply Comments of the Ad Hoc Telecommunications Users Committee, WC Docket 05-25 (filed July 29, 2005); Reply Comments of NEXTEL, WC Docket 05-25 (filed July 29, 2005); Reply Comments of COMPTEL/Ascent, WC Docket 05-25 (filed July 29, 2005).

[222] *See, e.g.*, Comments of ATX *et al.*, WC Docket 05-25, at 3-13 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket 05-25, at 7-19 (filed July 29, 2005).

[223] *See, e.g.*, Comments of ATX *et al.*, WC Docket 05-25, at 3-7 (filed June 13, 2005); Reply Comments of ATX *et al.*, WC Docket 05-25, at 7-10 (filed July 29, 2005).

As shown in response to the Commission's recent request to "refresh the record,[224] the BOCs continue to earn extraordinarily high returns on special access services. As of the year ended 2006, the BOCs' special access rates-of-return based on ARMIS data were as follows: AT&T - 100%; Qwest – 132%. Verizon – 52%. Overall, the BOCs averaged an astounding 78 percent rate-of-return.[225]

In 2004, it is estimated that that the BOCs' overcharges yielded $6.4 billion in excessive special access revenues or $17.5 million per day.[226] Sprint has estimated that its 2004 access charge cost was approximately $103 million higher under the FCC's current pricing flexibility regime than it would have been had those services been available at price cap rates.[227] From 2004 to 2006, the BOCs' overcharges increased 30 percent - *the BOCs' overcharges yielded $8.31 billion in excessive special access revenues or $22.77 million in overcharges per day in 2006.*[228]

---

[224] *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, WC Docket No. 05-25, RM-10593, FCC 07-123 (rel. July 9, 2007).

[225] *See* Comments of ATX *et al.*, WC Docket 05-25, at 12 (filed Aug. 8, 2007). The annual rates of return were calculated using ARMIS data reported for interstate special access services. Specifically, we divided the net return by average net investment to calculate the rates of return. *See* ARMIS 43-01, Table 1, Cost and Revenue, rows 1910, 1915, col. s.

[226] Reply Comments of the Ad Hoc Telecommunications Users Committee, WC Docket No. 05-65, Reply Declaration of Susan M. Gately, ¶ 6 (filed May 10, 2005).

[227] Sprint Comments, WC Docket No. 05-25, at 5 (filed June 13, 2005).

[228] *See* Comments of ATX *et al.*, WC Docket 05-25, at 14 (filed Aug. 8, 2007).

Because these year-over-year returns would not be realized if the special access marketplace were truly competitive (which, as noted elsewhere, is what the FCC predicted, erroneously, would be achieved by now), competitive carriers that utilize the BOCs' special access services are paying far more for such services than what would be lawful, *i.e.*, just and reasonable, if rates, terms and conditions associated with them were objectively scrutinized by a regulatory authority. The GAO recent report discussed above confirms this.[229]

Second, the availability of Section 271(c) loop and transport facilities provides no safeguards for competition in the MSAs at issue if Qwest's request for forbearance from loop and transport unbundling is granted. As previously discussed, the BOCs contend that they satisfy their Section 271 checklist by offering special access services. Although the Act's just and reasonable pricing standard applies to section 271 elements, the BOCs deny that state commissions have the authority to investigate whether the BOC 271 rates are just and reasonable. The issue of whether state commissions have the authority to establish Section 271 rates and determine what rates are just and reasonable under Section 271 is currently before the Commission in two proceedings.[230] Furthermore, as Qwest realizes, there are competing decisions at the federal

[229] GAO Report at 13 (finding that the Commission's Phase II pricing flexibility rules do not accurately predict competition and that the "prices are higher, on average, in phase II MSAs - where competition is theoretically more vigorous- than they are... where prices are constrained" by price cap regulation).

[230] *See BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245 (filed July 1, 2004) (petitioning the Commission to assert exclusive jurisdiction over the enforcement of section 271 and preempt a state commission ruling asserting jurisdiction); Petition of the Georgia Public Service Commission for Declaratory Ruling and

district court level and among state commissions on these issues and number of these decisions are still being appealed.[231] The few state commissions that have investigated a BOC's 271 rates

---

Confirmation of Just and Reasonableness of Established Rates, WC Docket No. 06-90 (filed Apr. 18, 2006).

[231] *See, e.g., Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. T-01051B-04-0425, Decision No. 68440, 2006 Ariz. PUC LEXIS 5 (Ariz. C. C. Feb. 2, 2006), rev'd, , *Qwest Corp. v. Ariz. Corp. Comm'n*, No. 2:06-CV-01030-ROS, slip op. at 8-13 (D. Ariz. July 17, 2007); *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc.'s. Obligations to Provide Unbundled Network Elements, Docket No. 19341-U, Order Initiating Proceeding to Set Just and Reasonable Rates Under Section 271*, 2006 Ga. PUC LEXIS 3 (Ga. P.S.C. Jan. 17., 2006) and Order Setting Rates Under Section 271, 2006 Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006), *appeal pending, BellSouth Telecomm., Inc. v. Georgia Pub. Serv. Comm'n et al.*, No. 1:06-CV-00162-CC and *Competitive Carriers of the South, Inc. et al. v. Georgia Pub. Serv. Comm'n,* No. 1:06-CV-0972-CC (consolidated) (N.D. Ga.) (filed Jan. 24, 2006); *BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Southeast Telephone Inc. for Non-Payment and Southeast Telephone Inc. and Southeast Telephone Inc. v. BellSouth Telecommunications, Inc.*, Case Nos. 2005-00533 and 2005-00519 (consolidated), Order, 2006 Ky. PUC LEXIS 680 (Ky. P.S.C. Aug. 16, 2006), *appeal pending, BellSouth Telecomm., Inc. v. Kentucky Pub. Serv. Comm'n et al.*, 3:06-CV-00065-KKC (E.D. Ky.) (filed Sep. 12, 2006); *Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II (Me. P.U.C. Sep. 3, 2004), *aff'd, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006), *appeal pending, Verizon New England Inc. v. Maine Pub. Utils. Comm'n*, No. 06-2151, (1st Cir. filed Jul. 19, 2006); *In the Matter, on the Commission's Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, Case No. U-14447, Order, 2005 Mich. PUC LEXIS (Mich. P.S.C. Sep. 20, 2005), *appeal pending, Michigan Bell Tel. Co., d/b/a AT&T Michigan v. Covad Communications Company et al.*, No. 2:06-CV-11982 (E.D. Mich.) (filed Apr. 28, 2006); *In the Matter of a Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, Docket No. P-421/CI-05-1996, Notice and Order for Hearing, 2006 PUC LEXIS 48 (Minn. P.U.C. May 4, 2006); *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement*, Case No. TO-2005-0336, Arbitration Order, 2005 Mo. PSC LEXIS 963 (Mo. P.S.C. July 11, 2005), *rev'd in part SBC Missouri v. Mo. Pub. Serv. Comm'n, et al.*, 2006 U.S. Dist. LEXIS 65536 (E.D. Mo. Sep. 14, 2006), appeal

have found that special access rates are not just and reasonable and have ordered the BOCs to charge other rates or have found that TELRIC rates apply unless the BOC can show that higher rates are just and reasonable.[232] In light of the significant disputes and uncertainty regarding the BOCs compliance with their 271 obligations it is unreasonable for the Commission to predicate forbearance from unbundling loops and transport on the availability of Section 271 elements.

Finally, Section 251(c)(4) resale cannot be relied on to provide wholesale access for competitors either. In 2000, the Eighth Circuit vacated and remanded the FCC's avoidable cost standard[233] that applied in determining the resale discount.[234] The Commission has yet to respond

---

pending, No. 06-3726 (8th Cir. filed Oct. 17, 2006); *Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing)*, Docket Nos. DT 03-201 and 04-176 (consolidated), Order No. 24,442, Order Following Brief, 2005 N.H. PUC LEXIS 24 (N.H. P.U.C. Mar. 11, 2005), *rev'd in part, Verizon New England, Inc. v. N.H. Pub. Utils. Comm'n*, No. 05-CV-94-PB (D. N.H. 2006), *appeal pending, New Hampshire Public Utilities Comm'n v. Verizon New England, Inc.*, No. 06-2429 (1st Cir. filed Sep. 21, 2006).

[232] *See, e.g., Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, Order Setting Rates Under Section 271, 2006 Ga. PUC LEXIS 21 (Ga. P.S.C. Mar. 8, 2006); Order on Reconsideration (Ga. P.S.C. Mar. 24, 2006); *VERIZON-MAINE Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order at 8 (Me. P.U.C. Oct. 6, 2006).

[233] Under the FCC's vacated standard, avoided retail costs were those costs that an ILEC "would no longer incur if it were to cease retail operations and instead provide all of its services through resellers." *Local Competition Order*, ¶ 911.

[234] *Iowa Utilities Board v. FCC*, 219 F.3d 744, 754-56 (8th Cir. 2000).

to the Eight Circuit's remand and its proceeding for gathering comments on how to modify the resale discount remains open.[235]

At bottom, for the Commission to entrust the viability of wholesale competition on special access, section 271(c) wholesale offerings, and section 251(c)(4) resale, is akin to saying wholesale competition is safe in a car with a cracked engine and radiator that leaks profusely, a grinding transmission, and bald tires with wheels that are barely attached. The car may be able to run but it won't go far. Indeed, the wholesale competitive industry would be placed in a perilous predicament if it had to rely on such a vehicle to develop and succeed. It would be arbitrary and capricious for the Commission to remove loop and transport unbundling in the four MSAs at issue, before it addresses the structural problems applicable to the ILECs' non-UNE wholesale offerings, *i.e.*, special access, Section 251(c)(4) resale, Section 271(c).

VIII. QWEST HAS ALREADY OBTAINED UNBUNDLING RELIEF WHERE COMPETITORS ARE ABLE TO CONSTRUCT THEIR OWN FACILITIES

Apart from any other reason, the Commission should deny the Qwest Petitions because it has already obtained unbundling relief where the Commission's rules adopted in the *TRRO* identify the wire center from which competitors can feasibly construct their own loops and transport.[236] Qwest refers to competition in the wire centers where most of its demand is concen-

[235] *See Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, Notice of Proposed Rulemaking, 18 FCC Rcd 18945, ¶¶ 141-146 (2003).

[236] *TRRO*, ¶¶ 167-181.

trated,[237] but these are the wire centers where it is most likely that the FCC rules already provide unbundling relief. Therefore Qwest has already obtained loop and transport unbundling relief in wire centers where competition is most pronounced. Qwest has additionally obtained unbundling relief for the FTTH, FTTC, and the packet-switched capability of hybrid loops. In light of this substantial forbearance relief, there is no basis for granting the instant Petitions. The Commission should deny the applications because Qwest has already obtained substantial unbundling relief tailored to where competitors are able to construct their own facilities.

IX. OTHER REQUESTED FORBEARANCE RELIEF IS UNJUSTIFIED

In addition to relief from Section 251(c)(3) unbundling obligations, Qwest seeks forbearance from Section 271(c)(2)(B)(ii) unbundling obligations, dominant carrier tariff regulation in Part 61 tariff rules, price cap regulation, Computer III Comparably Efficient Interconnection and Open Network Architecture requirements, and Section 214 and Part 63 obligations concerning acquiring lines, discontinuing services, and transfers of control.[238] Although its requests would apparently encompass deregulation of important services such as special access that are the subject of separate proceedings,[239] Qwest's request for forbearance from these obligations must

[237] Denver Petition at 2; Minneapolis Petition at 3; Phoenix Petition at 2; Seattle Petition at 3.

[238] Denver Petition at 3; Minneapolis Petition at 3; Phoenix Petition at 3; Seattle Petition at 3.

[239] *See generally, Special Access NPRM.*

be denied if for no other reason than that it makes no effort to separately address how forbearance from each of these requirements would meet Section 10 forbearance standards.

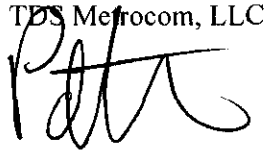
In addition, Qwest has not shown that it lacks market power in the provision of last mile and other inputs to competitors' services. Removal of the requested regulatory safeguards would inevitably lead to the elimination of competition that is dependent on Qwest facilities. Accordingly, Qwest has not shown that enforcement of these regulatory requirements is unnecessary to assuring reasonable terms and conditions of service and protecting consumers, that forbearance would be consistent with the public interest, or that it would promote competition.

X. CONCLUSION

The Commission should deny the above-captioned Petitions.

Respectfully submitted,

Affinity Telecom, Inc.
Cavalier Telephone, LLC
CP Telecom, Inc.
McLeodUSA Telecommunications Services, Inc.
Integra Telecom, Inc.
TDS Metrocom, LLC



Andrew D. Lipman
Russell M. Blau
Patrick J. Donovan
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, D.C. 20006
(202) 373-6000

Their attorneys

August 31, 2007

REDACTED – FOR PUBLIC INSPECTION

Affinity, Cavalier, CP Telecom
Globalcom, McLeodUSA, Integra, TDS
WC Docket No. 07-97
August 31, 2007

ATTACHMENT 1

DECLARATION OF HELEN E. GOLDING, ECONOMICS AND TECHNOLOGY, INC.